Discovery believes that these revisions should towards ensuring fair competitive among video distributors. Moreover, in order to ensure that telephone companies do not disrupt the robustly competitive *programming* marketplace by unfairly subsidizing their own programming services, the Commission should, at an absolute minimum, require that any such programming services be provided by a separate unregulated subsidiary, subject to the Part 64 rules.

B. The Record Supports Adoption Of Rules To Ensure That a LEC, Under Title II Regulation, Does Not Use "Channel Sharing" As A Ruse To Thwart Full And Fair Competition On The Video Platform

As Discovery has previously commented, channel sharing on a Title II VDT system is a network management issue that is unrelated to, and does not override, a programmer's right to control the carriage, and terms of carriage, of its programming.[27] Discovery therefore urged the Commission to reject channel sharing proposals that might infringe upon a programmer's intellectual property rights and to limit a LEC's role in administering any channel sharing mechanism to ministerial and technical tasks.

Consistent with this view, Discovery believes that such a policy is even more necessary where a LEC is both the operator of a VDT system and a provider of a competing program package. In this situation, a LEC might attempt to manipulate its channel sharing mechanism for unfair competitive gain by impeding a competing

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[27] *See* Reply Comments of Discovery Communications, Inc., CC Docket No. 87-266 (filed Jan. 17, 1995) at 2-4.

packager's right of access to potentially shared channels. Such actions would undermine the Commission's goal of fostering multiple competitive program packagers since packagers must be able to offer subscribers program services licensed free of impediment from the network provider. Further, as discussed above, Discovery is concerned that a LEC might try to use its dual role as "channel administrator" and dominant program packager to require an unaffiliated programmer, as a condition of carriage in the LEC's affiliate package, to agree to a platform-wide sublicensing agreement in the name of channel sharing.

Accordingly, in the event that the Commission decides to retain its common carrier VDT regulatory regime, Discovery recommends that the Commission prohibit LECs from establishing or administering channel sharing plans the effect of which is to interfere with licensing arrangements between a programmer and a competing packager, particularly where the LEC is affiliated with a packager on the VDT system. Fair competition on the video platform will not develop unless LECs are strictly prohibited from using their administrator role for anticompetitive purposes.

C. The Record Strongly Supports Adoption Of Rules To Address A LEC's Potential Unfair Competitive Advantages With Respect To Joint Telemarketing Of Telephone And Video Services And Use Of Customer Proprietary Network Information

Discovery joins the many commenters in this proceeding calling for additional joint marketing or CPNI rules where LECs provide both voice telephony and video services.[28] The LECs' local exchange monopolies confer them with significant opportunities for self-favoritism and unfair competition in the marketing of video services. These competitive concerns are not adequately addressed by existing Title II or Title VI safeguards.

Discovery supports the many commenters that recommended the Commission tailor its policy on LEC joint marketing of telephone and video services in full recognition of LECs' expanding role in the video marketplace. In particular, the Commission should modify for the video context its existing rules regarding LEC-affiliate use of CPNI, which are insufficient to ensure fair competition between the LEC and unaffiliated firms.

First, the Commission should prevent a LEC from using its monopoly local telephone operations to jointly market telephone service and its affiliated video services (whether a Title II VDT platform or a Title VI cable system) in an anticompetitive manner. An example of the potential unfairness of such joint marketing is the situation in which new residents to a community, seeking immediate telephone service, make

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[28] CCTA at 21-22; Cox at 17; NCTA at 51-52; Center for Media Education *et al.* at 21-22.

"inbound" calls to the LEC for such service. These consumers could be sold both telephone service and the LEC video VDT platform, VDT package, or cable service in one transaction before even learning of competitive packagers' services. Having no monopoly local telephone company of their own, unaffiliated programmers and packagers would operate at a distinct competitive inequity that could frustrate the goal of multiple competing video services, even among program packagers on a LEC's video platform.

Discovery therefore recommends that the Commission generally prohibit such inbound telemarketing under both a Title II and a Title VI regulatory regime. However, in recognition of the possible efficiencies involved, Discovery agrees with those commenters who favor allowing a LEC to provide inbound telemarketing or referral services if the LEC provides the same service on the same terms, conditions, and prices to affiliates and non-affiliates alike.[29]

Second, fair video competition requires that the Commission supplement its existing rules governing the use of CPNI by LEC video programming and packaging affiliates. CPNI, as currently understood, encompasses all information about a customer's network services, including billing information, usage data, calling and viewing patterns, and traffic studies.[30] This definition would appear to encompass information about an end user's use

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[29] NCTA at 39; Pacific Telesis at 11.

[30] *See Filing and Review of Open Network Architecture Plans (Memorandum Opinion and Order)*, 4 FCC Rcd 1, 215, *recon.*, *BOC ONA Reconsideration Order*, 5 FCC Rcd 3103 (1990). Discovery notes that several LECs recently have suggested that network information generated from VDT operations may not meet the definition of CPNI. One (continued...)

of video services on a video system, particularly if the video service is considered a telecommunications service. The existing CPNI rules give the LEC affiliate an unfair competitive advantage in marketing its services to VDT subscribers.

Under the existing rules, a LEC need obtain prior authorization to use CPNI only for those customers with more than twenty access lines. In the VDT context, a LEC affiliate will virtually never need such consent, however, since end users typically will have only one line. The LEC affiliate will thus have free access to end users' CPNI -- which will confer a valuable tool for identifying potential subscribers -- while a competing programmer or packager will have no access to the same commercially valuable information unless they first obtain the end user's consent (at which point the CPNI may have little further value). The Commission should modify this policy by creating a presumption against access to an end user's CPNI by a LEC affiliate without the end user's express prior written consent.

Moreover, the existing CPNI rules could allow a LEC affiliate access to the CPNI of competing programmers and packagers -- depending on their size -- a possibility that would render fair competition impossible. The Commission should prevent prohibit LECs from making available to their affiliated packagers any information regarding a competing programmer's or packager's subscribers, traffic, or network usage.

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[30](...continued)
consequence of such an interpretation is that no protections would apply to that information. Regardless of whether end users viewing information or packager traffic data are "CPNI" as currently defined, the FCC should ensure in *this* proceeding the necessary and proper protections of such data.

IV. CONCLUSION

Allowing telephone companies to use their facilities to provide video programming can increase competition among program packagers and between video facilities in a manner that enhances the quantity and quality of video programming services available to the public. But it can also have precisely the opposite effect, if the telephone companies' unique opportunities to engage in cross-subsidization and discrimination are not held in check. The telephone companies' incentives to engage in anticompetitive conduct will only be increased by their newly-won ability to provide their own programming directly to subscribers.

For the foregoing reasons, the Commission should ensure that telco-affiliated programming services are subject to the same regulatory restrictions as cable-affiliated program services; that, whether subject to Title II or Title VI, a telephone company will not be permitted to cross-subsidize its video programming and facilities with regulated local exchange revenues; and that telephone companies that provide Title II VDT service do so in a fully nondiscriminatory manner that does not favor their affiliated packagers and program services.

Respectfully submitted,

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